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No. 379

In the Supreme Court of the United States

OCTOBER TERM, 1951

RALPH CASEY, GEORGE LA CLAIR, AND EDWARD PLESA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 318–326) is reported at 191 F. 2d 1.

JURISDICTION

The judgment of the Court of Appeals was entered on June 27, 1951 (R. 327) and a petition for a rehearing was denied on September 14, 1951 (R. 328). The petition for a writ of certiorari was filed on October 10, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a); F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether, on receipt of information that petitioners, for whom a warrant of arrest on a charge of illegal broadcasting was being sought, were about to depart in a car owned by one of them and parked in a public garage, federal investigators were justified in searching the car for radio broadcasting equipment without a warrant.

2. Whether Section 318 of the Communications Act of 1934, as amended, providing that the Federal Communications Commission, upon finding that the "public interest, convenience, or necessity" will be served thereby, may waive or modify the statutory provisions requiring an operator's license for radio broadcasts, is unconstitutional as an unlawful delegation of legislative authority to the Commission.

STATUTES INVOLVED

The pertinent provisions of the Communications Act of 1934, 48 Stat. 1064, as amended by 50 Stat. 56, 47 U. S. C. 301, *et seq.* are as follows:

Section 301:

> It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any

right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

Section 318:

The actual operation of all transmitting apparatus in any radio station for which a station license is required by this Act shall be carried on only by a person holding an operator's license issued hereunder, and no person shall operate any such apparatus in such station except under and in accordance with an operator's license issued to him by the Commission: *Provided, however,* That the Commission if it shall find that the public interest, convenience, or necessity will be served thereby may waive or modify the foregoing provisions of this section for the operation of any station except (1) stations for which licensed operators are required by international agreement, (2) stations for which licensed operators are required for safety purposes, (3) stations engaged in broadcasting, and (4) stations operated as common carriers on frequencies below thirty thousand kilocycles: *Provided further,* That the Commission shall have power to make special regulations governing the granting of licenses for the use of automatic radio devices and for the operation of such devices.

Section 501:

Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this Act prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this Act

required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided herein, by a fine of not more than $10,000 or by imprisonment for a term of not more than two years, or both.

STATEMENT

Petitioners were tried under a seven-count indictment, alleging violations of Sections 301 and 318 of the Communications Act of 1934 (47 U. S. C. 301, 318) (*supra*, pp. 2–4). Counts I, II and III charged three unlawful radio transmissions made "without a station license having first been granted by the Federal Communications Commission" in violation of Section 301 (R. 2–4). Counts IV, V and VI dealt with the same communications and alleged that they violated Section 318, having been made "without a radio operator's license having first been issued by the Federal Communications Commission" (R. 4–6). Count VII was a conspiracy charge. The jury found the three petitioners guilty on the first six counts, but not guilty on count VII (R. 21–23). Petitioners Casey and LaClair were sentenced to imprisonment for 7 months on count I and to pay a fine of one dollar on each of counts II through VI inclusive (R. 24–28). Petitioner Plesa's sentence was identical, except that his imprisonment was

for 5 months instead of 7 (R. 28–30). On appeal (R. 30–31), the Court of Appeals unanimously affirmed the convictions (R. 327).

The evidence adduced at the trial disclosed that, after receipt of a tip that an unlicensed radio transmitter in Seattle, Washington, had been used to bilk bookies by enabling the scheming bettors to know the winners of horse races before placing their bets (R. 207–208), employees of the Federal Communications Commission tried repeatedly over a period of about a week to locate the unlicensed radio transmitter. On February 10 three Commission engineers, Hallock, Arlowe and Ames, conclusively identified the unauthorized broadcasts as coming from Room 1217 of the Ben Franklin Hotel (R. 66–70, 95–96, 133–138, 188–189). At about 1:50 p. m., Arlowe left the hotel to go to the United States Commissioner's office to obtain a warrant for petitioners' arrest (R. 71–72, 150).

A short time later, Hallock and Ames received word that petitioners were about to check out. They telephoned to a garage around the corner from the hotel, at which a car belonging to petitioner LaClair was stored, and requested the attendant to immobilize the car, which he did by removing some parts from the engine (R. 224–6). Ames and Hallock arrived at the garage at about 2:15 p. m., and were informed by Turner, the garage attendant, that some person had just put

two bags in the car (R. 140–141). At Ames' request Turner opened the back compartment with the car keys which were in his possession. Ames then opened a large suitcase and saw a radio transmitter; he told Turner to lock the car again. (R. 71–72, 141–142.)

About 3:20 p. m., Arlowe went to Room 1217 of the hotel with the United States marshal who arrested the three petitioners under a warrant of arrest (R. 72, 101, 178–180). After a futile search of the room for the radio equipment, Arlowe learned from Ames that the radio equipment was in the automobile (R. 73–74, 79–80, 101–104, 144–145). Arlowe went to the garage, directed the attendant, Turner, to open the car and then removed the bags containing the transmitter and the receiving equipment, which were received in evidence as Plaintiffs' Exhibits 5 and 6 (R. 75–77, 147–148, 196, 234–235). When the transmitter was tested, its frequency was the same as the signals heard during the illegal broadcasts made by petitioners (R. 108–109).

The evidence was uncontradicted that petitioners did not have, and did not apply to the Federal Communications Commission for, either operators' or station licenses (R. 285).

Before trial, petitioner LaClair moved to suppress the evidence as to the radio equipment taken from the automobile "against the wishes of affiant and the other defendants" (R. 13–14).

The District Court denied the motion. When the exhibits were introduced in evidence, counsel for all three petitioners objected to their admission (R. 76–77), but the District Court admitted them on the ground that the search of a movable vehicle was reasonable under the doctrine of *Carroll* v. *United States*, 267 U. S. 132. (R. 234–5.) After trial, all three petitioners moved for a new trial on the ground that the evidence should have been suppressed (R. 23–24). On appeal, the Court of Appeals held that it was unnecessary to consider the validity of the search since none of the petitioners claimed ownership in the garage where the search occurred or asserted an interest in the radio equipment seized at the time of the motion to suppress (R. 323). It further held that "any constitutional immunity to which [petitioner LaClair] might otherwise have been entitled with respect to his automobile and its contents was lost when he placed the garage, a bailee for hire, in possession of his automobile." (*Ibid.*)

DISCUSSION

The sole ground of the Court of Appeals' decision was that petitioners lacked standing to object to the search and seizure. At least as to petitioner LaClair, we think this ground of decision seems erroneous in the light of *United States* v. *Jeffers*, No. 3, this Term, decided November 13, 1951. We do not believe that the facts that the

car owned by LaClair was in a public garage, and that the garage attendant had the keys, destroyed LaClair's standing to object to a search of the car.[1] Indeed, his claim to standing would appear to be considerably stronger than that of *Jeffers*, whose box containing narcotics was stored without authorization in his aunt's hotel room. Accordingly, at least as to petitioner LaClair, the ground of decision adopted by the Court of Appeals seems erroneous.[2] Since the question as to the application to the facts of this case of the rule of *Carroll* v. *United States*, 267 U. S. 132, was not considered by the Court of Appeals and is not free from difficulty, we suggest that this Court remand the case to the Court of Ap-

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[1] Cf. *Jeffers* opinion at p. 4, pointing out that the implied permission to enter a hotel room, given to "such persons as maids, janitors or repair men in the performance of their duties" does not remove hotel rooms from the protection of the IVth Amendment.

[2] The other petitioners, whose ownership, jointly with LaClair, in the radio equipment was undisputed (R. 258, 268, 274–275), may have lost standing to object to the search and seizure, unless that standing was lost by their failure to join in the motion to suppress, or to assert, until after the seized evidence had been admitted, any property interest in it. Cf. *Cogen* v. *United States*, 278 U. S. 221, 223, Rule 41 (e), F. R. Crim. P. Since the validity of the search is properly in issue as to LaClair, we believe that it will promote efficient judicial administration to allow questions of standing of the other petitioners to be reexamined by the court below in the light of its disposition of that issue.

peals for further proceedings in the light of the Jeffers decision.[3]

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

November 1951.

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[3] Petitioners' assertion of unconstitutionality of § 318 of the Communications Act is plainly without merit. See opinion below, R. 325–326. In any event, that contention affects only Counts IV, V, and VI, on which fines of $1 were imposed.

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Brief for the U.S.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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JURISDICTION

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QUESTIONS PRESENTED

1. Whether petitioner La Clair, the owner of an automobile parked in a public garage, had standing to challenge the validity of a search of the automobile.

2. Whether, in the circumstances of this case, the search of an immobilized automobile parked in a public garage and the seizure therefrom of certain equipment, without a warrant, were reasonable.

3. Whether it was error to admit the seized evidence against codefendants having an interest in the seized equipment, who did not move to suppress before the trial but whose motion at the trial was denied on the merits.

4. Whether Section 318 of the Communications Act of 1934, as amended, providing that the Federal Communications Commission, upon finding that the "public interest, convenience, or necessity" will be served thereby, may waive or modify the statutory provisions requiring an operator's license for radio broadcasts, is unconstitutional as an unlawful delegation of legislative authority to the Commission.

STATUTES AND RULE INVOLVED

The pertinent provisions of the Communications Act of 1934, 48 Stat. 1064, as amended by 50 Stat. 56, 47 U.S.C. 301 *et seq.*, are as follows:

> Sec. 301. It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of inter-

state and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance

with this Act and with a license in that behalf granted under the provisions of this Act.

Sec. 318. The actual operation of all transmitting apparatus in any radio station for which a station license is required by this Act shall be carried on only by a person holding an operator's license issued hereunder, and no person shall operate any such apparatus in such station except under and in accordance with an operator's license issued to him by the Commission: *Provided, however*, That the Commission if it shall find that the public interest, convenience, or necessity will be served thereby may waive or modify the foregoing provisions of this section for the operation of any station except (1) stations for which licensed operators are required by international agreement, (2) stations for which licensed operators are required for safety purposes, (3) stations engaged in broadcasting, and (4) stations operated as common carriers on frequencies below thirty thousand kilocycles: *Provided further*, That the Commission shall have power to make special regulations governing the granting of licenses for the use of automatic radio devices and for the operation of such devices.

Sec. 501. Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this Act prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this Act required to be done; or willfully and knowingly causes or suffers

such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided herein, by a fine or not more than $10,000 or by imprisonment for a term of not more than two years, or both.

Rule 41(e), F.R. Crim. P.:

Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

STATEMENT

Petitioners were tried under a seven-count indictment alleging violations of Sections 301 and 318 of the Communications Act of 1934 (47 U.S.C. 301, 318) (*supra*, pp. 2-4). Counts I, II and III charged them with having made three unlawful radio transmissions "without a station license having first been granted by the Federal Communications Commission," in violation of Section 301 (R. 2-4). Counts IV, V and VI charged them with having made the same communications "without a radio operator's license having first been issued by the Federal Communications Commission," in violation of Section 318 (R. 4-6). Count VII was a conspiracy charge (R. 6-12). The jury found the three petitioners guilty on the first six counts, but not guilty on count VII (R. 21-23). Petitioners Casey and La Clair were each sentenced to imprisonment for seven months on count I and to pay a fine of one dollar on each of counts II through VI (R. 24-28). Petitioner Plesa's sentence was identical, except that his imprisonment was for five months (R. 28-30). On appeal (R. 30-31), the Court of Appeals affirmed the convictions (R. 327).

The evidence adduced at the trial disclosed that, after receiving a tip that an unlicensed radio transmitter in Seattle, Washington, had been used to cheat bookies in Everett, Washington, by enabling the scheming bettors to know the winners of horse races before placing their bets (R. 207-208), employees of the Federal Communications Commis-

sion tried repeatedly over a period of about a week to locate the unlicensed radio transmitter. During this period of time, they overheard, by use of various listening devices, the radio transmissions charged in the indictment (R. 59-67, 111-112, 122-129, 133-135, 171-178, 186-189). On February 10 three Commission engineers, Hallock, Arlowe and Ames, conclusively identified the unauthorized broadcasts as coming from Room 1217 of the Ben Franklin Hotel (R. 66-70, 95-96, 133-138, 188-189). At about 1:50 p.m., Arlowe left the hotel to go to the United States Commissioner's office to obtain a warrant for petitioners' arrest (R. 71-72, 150).

A short time later, Hallock and Ames, who had returned to their office, received word from the hotel manager that petitioners were about to check out, but that he was going to hold the garage check for their car as security for their hotel bill (R. 82, 139-140, 192, 212-213). The car, which belonged to petitioner La Clair, was stored at the Motor Ramp Garage, located two blocks from the hotel (R. 13, 20, 75, 193). By telephone, Hallock requested the garage attendant to immobilize the car, which he did by removing some parts from the engine (R. 200, 224-226). Ames and Hallock then went to the garage, arriving at about 2:15 p.m., at which time they were informed by Turner, the garage attendant, that some person had just put two bags in the car (R. 140-141). At Ames' request, Turner opened the back compartment with the car keys which were in his possession. Ames then opened a large suit-

case in the compartment and saw a radio transmitter. Nothing, however, was removed from the car and it was relocked. (R. 142, 227-228.) Two Seattle policemen were summoned to stand by in the garage to prevent possible violence (R. 142-143, 153-155, 197-198, 228-230, 288-289).

In the meantime Arlowe had secured a warrant for petitioners' arrest, after being detained for half an hour at the United States Commissioner's office (R. 72). During this period Hallock had, from the garage, twice called the Federal Communications office, once while Arlowe was waiting at the Commissioner's office and again after the warrant of arrest had been issued (R. 141, 142, 197-198). Arlowe had also called the Federal Communications office. (R. 198).

About 3:20 p.m., Arlowe, armed with the arrest warrant, went to Room 1217 of the hotel with the United States Marshal, who arrested the three petitioners (R. 72, 101, 178-180). After a futile search of the room for the radio equipment, Arlowe learned from Ames that the radio equipment was in the automobile (R. 73-75, 79-80, 101-104, 144-145). Arlowe went to the garage, directed the attendant, Turner, to open the car, and then removed the bags containing the transmitter and the receiving equipment, which were received in evidence as Plaintiff's Exhibits 5 and 6 (R. 75-77, 147-148, 196, 234-235). The two policemen and Hallock had remained with the car until the equipment was

seized (R. 80, 87). The frequency of the seized transmitter was the same as the signals heard during the illegal broadcasts made by petitioners (R. 108-109). The evidence was uncontradicted that petitioners did not have, and had not applied to the Federal Communications Commission for, either operators' or station licenses (R. 285).

Before trial, petitioner La Clair moved to suppress as evidence the radio equipment taken from his automobile, and for its return to him (R. 12). In his supporting affidavit he alleged that it was taken "against the wishes of affiant and the other defendants" (R. 13-14). The District Court denied the motion. No claims as to the ownership of the equipment were made at that time, but during the trial petitioners testified that it was owned by all of them jointly (R. 258, 268, 274). When the exhibits were offered in evidence, counsel for all three petitioners objected to their admission (R. 76-77). At the close of the Government's evidence, this objection was renewed and argued, but the District Court admitted the exhibits on the ground that the search of a movable vehicle was reasonable under the doctrine of *Carroll* v. *United States*, 267 U.S. 132 (R. 231-235). A motion on behalf of all three petitioners to suppress the seized evidence was then denied (R. 236). After trial, all three petitioners unsuccessfully moved for a new trial on the ground, *inter alia*, that the evidence should have been suppressed (R. 23-24, 31).

On appeal, the Court of Appeals held that it was unnecessary to consider the validity of the search since none of the petitioners claimed ownership of the garage where the search occurred or asserted, at the time of the pre-trial motion to suppress, an interest in the radio equipment (R. 323). It further held that "any constitutional immunity to which [petitioner La Clair] might otherwise have been entitled with respect to his automobile and its contents was lost when he placed the garage, a bailee for hire, in possession of his automobile" (*ibid*).

SUMMARY OF ARGUMENT

I

The Court of Appeals concluded that petitioners had no standing to challenge the validity of the search, since (1) petitioners Casey and Plesa had made no motion to suppress before trial and (2) petitioner La Clair, who did file such a motion, had no interest in the garage where the car was stolen, and in his motion failed to claim an interest in the property seized.

We believe this ground of decision as to petitioner La Clair is erroneous, particularly in the light of the intervening decision of this Court in *United States* v. *Jeffers*, 342 U.S. 48. In the *Jeffers* case, this Court pointed out that, even though a hotel manager has a key to a hotel room and may for certain purposes enter the room, the use of such key by law enforcement officers to enter and search

the room without the permission of the occupant is unlawful. Likewise, we think, in storing his automobile in a public garage, petitioner La Clair did not so completely part with possession that he can be deemed to have lost standing to challenge an unlawful search of it. Irrespective of ownership of the property seized, he was entitled to have the evidence taken from the car suppressed if the search of his car was unlawful.

II

The district court thought the search, without a warrant, of La Clair's automobile sustainable under the doctrine of *Carroll* v. *United States*, 267 U.S. 132, that a movable vehicle can upon probable cause be searched without a warrant. That rule is a rule of necessity, and the necessity may exist even though the car is parked in a garage. *Scher* v. *United States*, 305 U.S. 251. Hence, when the agents learned that petitioners were about to leave and had placed their bags in the car, the agents may have been justified in taking steps to render the car immobile. But, having accomplished that, they had ample time to get a warrant, particularly since local law enforcement officers were guarding the car. The entire search and seizure cannot be justified by necessity.

III

Uncontroverted evidence was introduced at the trial showing that all the petitioners jointly owned

the radio equipment seized. Thus they all had standing to suppress that evidence provided they had taken timely action to do so. *United States* v. *Jeffers*, 342 U.S. 48. Although petitioners Casey and Plesa failed to move before trial to suppress the evidence, we think the court's action during the trial in denying on the merits a motion to suppress was reversible error as to them as well as La Clair.

If a motion to suppress is not made before trial, the court may ordinarily refuse to entertain such a motion later. *Segurola* v. *United States*, 275 U.S. 106, 111-112. But "the court in its discretion may entertain the motion at the trial" (Rule 41(e), F. R. Crim. P.). See also *Cogen* v. *United States*, 278 U.S. 221, 223. In the instant case, as the Government did not object to consideration of the motion during trial as untimely, the court denied it "as to each defendant" (R. 236) on the ground that the search fell within the doctrine of the *Carroll* case. Thus, the motion was entertained and erroneously denied on the merits. Such action eliminated the failure of these petitioners to assert their rights promptly (*United States* v. *Di Re*, 159 F. 2d 818, 820 (C.A. 2)), and the court's erroneous decision was reversible error as to all petitioners.

IV

There is no occasion for this Court to consider petitioners' contention that Section 318 of the Federal Communications Act is unconstitutional, for

the Court will not pass upon the constitutionality of an act of Congress if there is another ground for disposing of the case. *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 347, Justice Brandeis concurring. In any event, there is no merit in petitioners' claim that the provision authorizing the Commission to waive or modify the statutory requirement of a licensed radio operator, upon a finding that "the public interest, convenience, or necessity will be served thereby," contains an unconstitutional delegation of legislative power. Petitioners' case does not come within that provision, for there is no assertion that for any reason they were entitled to an exemption from the license requirement. This Court has held that a similar provision of Section 307, providing for the granting of station licenses by the Commission "if public convenience, interest, or necessity will be served thereby," was not too vague. *Federal Communications* v. *Broadcasting Co.*, 309 U.S. 134, 137-138; *Regents* v. *Carroll*, 338 U.S. 586, 598.

ARGUMENT

The Court of Appeals did not consider the validity of the search because it concluded that petitioners had not before trial shown that they had standing to object to the search and seizure. Since petitioner La Clair did, before trial, move to suppress and did claim ownership of the automobile searched, we thought this ground of decision erroneous as to him, particularly in the light of the

intervening decision of this Court in *United States v. Jeffers*, 342 U.S. 48. As the Court of Appeals had not considered the validity of the search and seizure, and particularly the application of the rule of *Carroll v. United States*, 267 U.S. 132, to the facts of this case, we suggested, in the Government's memorandum in response to the petition for a writ of certiorari, that the Court remand the case to the Court of Appeals for further consideration. We pointed out that petitioners Casey and Plesa might have lost standing to object to the search and seizure by their failure to join in the motion to suppress, or to assert, until after the seized evidence had been admitted, any proprietary interest in it.

We have subsequently concluded, for the reasons hereinafter set forth, that the search and seizure was illegal, and that the admission in evidence of the illegally seized radio equipment was reversible error as to each petitioner. For this reason, we concede that the judgment below was erroneous and should be reversed.

I

Petitioner La Clair Had Standing to Challenge the Legality of the Search and Seizure

The Court of Appeals concluded (R. 323) that petitioners had no standing to challenge the validity of the search since (1) petitioners Casey and Plesa had made no motion to suppress before trial

and (2) petitioner La Clair, who did file such a motion, had no interest in the garage where the car was stored, and in his motion failed to claim an interest in the property seized.

As stated in our prior memorandum, we believe this ground of decision as to petitioner La Clair is erroneous, particularly in the light of the intervening decision of this Court in *United States* v. *Jeffers*, 342 U. S. 48. See also *Johnson* v. *United States*, 333 U. S. 10. In the *Jeffers* case, this Court pointed out that although hotel employees have a key to a hotel room and may for certain purposes enter the room, the use of that key by law enforcement officers to enter and search the room without the permission of the occupant is unlawful. An analogous situation is, we think, presented when the owner of a car stores his car in a public garage and gives the keys to the attendant. The control of the car is relinquished only for proper garage functions. The search of the car's trunk is not within the implied permission given by the car owner to the garage attendant. Hence, in storing his automobile, petitioner La Clair did not so completely part with possession that he can be deemed to have lost standing to object to an unauthorized search of the car. Irrespective of whether or not he claimed ownership of the equipment seized, he was entitled to have the evidence taken from the car suppressed if the search of his car was unlawful.

II

Under the Circumstances of this Case the Search of the Car Was Unreasonable

The search of La Clair's automobile was made without a warrant. Hence, it could be valid only if the circumstances were such as to bring it within one of the recognized exceptions in which a search without a warrant is regarded as reasonable. The district court thought the search sustainable under the rule of the *Carroll* line of decisions (*Carroll* v. *United States*, 267 U.S. 123; *Husty* v. *United States*, 282 U.S. 694; *Scher* v. *United States*, 305 U.S. 251; *Brinegar* v. *United States*, 338 U.S. 160), that a movable vehicle can upon probable cause be searched without a warrant.

That rule, however, is a rule of necessity. This Court in the *Carroll* opinion quoted the House Committee Report (267 U.S. at 146): "It is impossible to get a warrant to stop an automobile. Before a warrant could be secured the automobile would be beyond the reach of the officer with its load of illegal liquor disposed of." The Court then pointed out that the Fourth Amendment had always been construed "as recognizing a necessary difference between a search of [buildings] in respect of which a proper official warrant readily may be obtained, and a search of [movable vehicles] where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality

or jurisdiction in which the warrant must be sought" (p. 153). And the Court carefully defined the rule in terms of necessity (p. 156):

> * * * In cases where the securing of a warrant is reasonably practicable, it must be used * * *. In cases where seizure is impossible except without warrant, the seizing officer acts unlawfully and at his peril unless he can show the court probable cause.

The necessity may exist even though the car has been brought to a stop. In *Scher* v. *United States*, *supra*, where the *Carroll* rule was applied, officers followed the defendant home and searched his car immediately after he had parked it in a garage adjacent to his residence. But the automobile, though not moving, was still a movable vehicle and could have been quickly removed from the jurisdiction unless immediately searched. (Compare also the references in *Carroll* v. *United States*, 267 U.S. 132, 151-3 to the power to search vessels at dock.)

We believe, therefore, that situations exist in which the search of an automobile without a warrant would be warranted by necessity even though the automobile is parked in a garage. In this very case, if the only facts adduced had been that the agents, after identifying the occupants of Room 1217 as the unauthorized broadcasters, learned, while one of their number was trying to get a warrant of arrest, that the occupants had placed their bags in the car and were about to check out, we

think that the search and seizure might well have been considered necessary under the circumstances.[1]

Those were not, however, the only facts bearing on the validity of the search and seizure in this case. Ames and Hallock, the agents of the Federal Communications Commission who were at the garage, were informed at 2:15 p.m. that the bags had been taken to the car (R. 140-141). The radio equipment was not seized until about 3:45 p.m. (R. 72-76), after the arrests had been made. During this period of time Arlowe, another employee of the Federal Communications Commission, obtained a warrant of arrest, after waiting for half an hour at the United States Commissioner's office (R. 72). Hallock, from the garage, twice called the Federal Communications Commission office, once while Arlowe was waiting at the Commissioner's office and again after the warrant of arrest had been issued (R. 141, 142, 197-198). Arlowe was also in telephonic communication with his office. Arlowe could easily have secured a search warrant at the same time he obtained the warrant of arrest.

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[1] The suggestion in *United States* v. *Di Re*, 332 U.S. 581, 585, that the Carroll doctrine is limited to situations in which searches of moving vehicles are specifically authorized by statute, was, we think, overruled by the *Brinegar* decision. A statute could not enlarge the scope of a constitutional amendment. The *Carroll* decision referred to the early statutes merely as reflecting the understanding of the Fourth Amendment by contemporary legislators, not as enlarging the definition of a reasonable search.

Moreover, there was no need for an immediate search and seizure, either at about 2:30 p.m. when the agents first searched the car, or at 3:45 p.m. when the equipment was seized. Neither petitioners, nor any one acting in their behalf, could possibly have moved the automobile. It was totally immobilized. The car was located in a public garage and the hotel manager was holding the claim check (R. 213). Certain parts had been removed from the motor without which it would not operate (R. 225). The keys to the car were in the possession of the garage attendant (R. 227), who was cooperating with the agents. Two police officers and a Federal Communications agent were guarding the car to prevent anyone from removing it (R. 154-155), or, indeed, from going to it. They did, in fact, intercept Mr. Donofrio, a friend of petitioners, who attempted to go to the car after petitioners had been arrested (R. 198).

The direction by the law enforcement officers to the garage attendant to immobilize the car would seem to have been justified by the necessities of the situation and, if such act be considered the commencement of a search, we think it might well be deemed reasonable under the circumstances. But, having accomplished the effective immobilization of the car, the agents had ample opportunity to get a warrant and were not justified in seizing the property without it. We therefore conclude that

the search and seizure as a whole cannot be supported under the *Carroll* rule.[2]

III

The Admission in Evidence of the Illegally Seized Radio Equipment Was Reversible Error as to All the Petitioners

Uncontroverted evidence was introduced at the trial which showed that all the petitioners owned the radio equipment seized (R. 258, 268, 274). By virtue of this ownership they all clearly had standing to suppress the illegally seized evidence provided they had taken timely action to do so. *United States* v. *Jeffers, supra*, 342 U.S. 48. Although petitioners Casey and Plesa failed to move before trial to suppress that evidence, we think that the trial judge having entertained and erroneously denied on the merits their motion to suppress made during the trial, their failure to move prior to the trial was cured and the court's decision was reversible error as to them as well as La Clair.

It is true that, in order to interject a violation of his Fourth Amendment rights as a bar to the admission of evidence, a defendant must ordinarily move before trial for the suppression of illegally obtained evidence. *Segurola* v. *United States*, 275 U.S. 106, 111-112. This requirement is embodied

[2] While the seizure of the equipment did not occur until after the arrest of petitioners, the automobile was first searched and the radio equipment discovered in the trunk about an hour prior to the arrest (R. 72-76, 140-141). Viewing the search and seizure as one transaction (see *United States* v. *Jeffers*, 342 U.S. 48, 52), we do not believe it could be sustained as incident to the arrest.

in Rule 41(e), F. R. Crim. P. But that rule also provides that "the court in its discretion may entertain the motion [for suppression] at the trial." This is a restatement of the prior law that the requirement of a pretrial motion is a rule "of practice; and is not without exceptions." *Cogen* v. *United States*, 278 U.S. 221, 223. See also *Gouled* v. *United States*, 255 U.S. 298, 312-313; *Amos* v. *United States*, 255 U.S. 313; *Agnello* v. *United States*, 269 U.S. 20, 34-35. Hence, if a defendant fails to move before the trial for the suppression of illegally obtained evidence, the judge may, and ordinarily should, refuse to entertain such a motion during the trial. But, on the other hand, he may do so in his discretion.

In the instant case the judge did entertain during the trial a motion by all the petitioners to suppress the evidence (R. 231-236). As the Government did not object to consideration of the motion as untimely, the court denied it "as to each defendant" (R. 236) on the ground that the search fell within the doctrine of the *Carroll* case (R. 234-235). This holding, as we have shown, *supra*, pp. 16-20, was erroneous. Having thus entertained the motion, the court's erroneous denial of it on the merits was, we think, reversible error as to all the petitioners, the illegally seized evidence being a substantial part of the Government's case against each of them. In other words, the failure of these petitioners promptly to assert their right to suppress was cured by the trial court's action in con-

sidering the motion during the trial and denying it on the merits. This was the position tacitly taken by the Government and approved by the Second Circuit in *United States* v. *Di Re*, 159 F. 2d 818, 820. See also comment thereon by this Court in affirming that judgment on other grounds, 332 U.S. 581, 582. The Second Circuit said (159 F. 2d at 820):

> The prosecution has not upon this appeal attempted to support the competency of the coupons on the ground that DiRe did not apply for their suppression before the cause came on for trial. It has done well not to do so, because it abandoned any such objection when it undertook, as has appeared in the passages we have quoted, to defend the search upon the merits. Both sides having presented the point to him in this way, we should have no warrant for supposing that the judge did not decide it; but without so indicating had refused to pass on the point because DiRe had delayed too long in asserting it. We may assume, arguendo, that, if he had chosen that for his ground, and had for that reason refused to consider the merits, he would have been within his powers, but he was not obliged to do so; he was free to pass by the delay and to give DiRe the benefit of the objection, if in his judgment, that would not unduly interfere with the trial. "The rule is one of practice, and is not without exceptions." The last sentence of Rule 41(e), is in this regard merely a restatement of the law as it was. It

would be a parody on justice now to hold that, although the judge was wrong in the decision which he did make, nevertheless, since he might have refused to make it at all, DiRe may not complain of the error.

We have not overlooked the holding in Mr. Justice Douglas' opinion, which was the opinion of the Court, in *McDonald* v. *United States*, 335 U.S. 451, 456, that, where a motion for the return of illegally seized evidence was erroneously denied as to one defendant, the convictions of all co-defendants should be reversed. This was rested on the reasoning that had the motion been granted the evidence would not have been available to the Government for use at the trial. This part of the opinion was concurred in by Justices Murphy, Frankfurter and Jackson, although the latter two also thought both defendants there had independent standing, which had been timely asserted, to suppress the evidence. Since the position so taken has not been passed on by a majority of the Court, the question would seem still to be an open one. Accordingly we prefer to rest our argument here on the grounds stated above.

IV

Section 318 of the Communications Act is Not Unconstitutional as an Unlawful Delegation of Legislative Authority to the Commission

Since there was reversible error as to all petitioners in the admission of the illegally seized evi-

dence, there is no occasion to pass upon petitioners' contention that Section 318 of the Federal Communications Act (*supra*, p. 4) is unconstitutional in that it contains an unlawful delegation of legislative authority to the Commission (Br. 26-29). The "Court will not pass upon a constitutional question * * * if there is also present some other ground upon which the case may be disposed of" (Brandeis, J., concurring in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347).

In any event, there is no merit in petitioners' contention. They claim that the provision allowing the Commission to "waive or modify" the statutory requirement that a radio station shall only be operated by a licensed operator, upon a finding that "the public interest, convenience, or necessity will be served thereby," does not furnish an adequate standard upon which discretionary Commission action may be predicated, or by which the "average individual may gauge and determine the nature of the violation" (Br. 28).

Neither the record nor petitioners' brief discloses any contention that by reason of "public interest, convenience, or necessity" they were entitled to a Commission ruling exempting them from the provisions of Section 318; nor could they seriously make such a contention. Not having petitioned the Commission for such an exemption ruling, it is difficult to see how petitioners can complain that they were prejudiced by alleged vagueness of the

statute. We submit that the reasonable interpretation of Section 318 is that a radio operator's license is required unless the Commission makes findings of fact that an individual because of "public interest, convenience, or necessity" should be exempt from the provisions of Section 318; and until the Commission does make such findings, the individual is charged with knowledge that if he broadcasts without the required license, he will be violating the law.

In applying Section 307 of the Act, providing for the granting of station licenses by the Commission "if public convenience, interest, or necessity will be served thereby," this Court has regarded the quoted phrase as being not too vague, and "as concrete as the complicated factors for judgment in such a field of delegated authority permit." *Federal Commission* v. *Broadcasting Co.*, 309 U.S. 134, 137-138; *Regents* v. *Carroll*, 338 U.S. 586, 598. See also *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 225-226; *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, 24-25. Just as the court below (R. 325-326), we see no reason for a different conclusion as to the phrase "public interest, convenience, or necessity" in Section 318.

CONCLUSION

For the reasons stated, we submit that the judgment below should be reversed as to all the petitioners.

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